AUSTRALIAN COMPETITION TRIBUNAL

Application by Ergon Energy Corporation Limited

(Service Target Performance Incentive Scheme) (No 10) [2011] ACompT 7

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| Citation: | Application by Ergon Energy Corporation Limited (Service Target Performance Incentive Scheme) (No 10) [2011] ACompT 7 |
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| Review from: | Australian Energy Regulator |
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| Parties: | **ERGON ENERGY CORPORATION LIMITED** **(ACN 087 646 062)** |
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| File number: |  |
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| Members: |  **(DEPUTY PRESIDENT),****MR R DAVEY AND MR R SHOGREN** |
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| Date of determination: | 29 March 2011  |
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| Date of hearing: | On the papers (Written Submissions dated 17 March 2011)  |
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| Place: |  |
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| Number of paragraphs: | 22 |
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| Solicitor for Ergon Energy Corporation Limited: | Minter Ellison Lawyers |
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| Solicitor for Australian Energy Regulator: | Corrs Chambers Westgarth |

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| IN THE AUSTRALIAN COMPETITION TRIBUNAL |  |
|  | FILE NO  |

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| RE: | APPLICATION UNDER SECTION 71B OF THE NATIONAL ELECTRICITY LAW FOR A REVIEW OF A DISTRIBUTION DETERMINATION MADE BY THE AUSTRALIAN ENERGY REGULATOR IN RELATION TO ERGON ENERGY CORPORATION LIMITED PURSUANT TO RULE 6.11.1 OF THE NATIONAL ELECTRICITY RULES |
| BY: | ERGON ENERGY CORPORATION LIMITED(ACN 087 646 062) |

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| MEMBERS: | MIDDLETON J (DEPUTY PRESIDENT),MR R DAVEY AND MR R SHOGREN  |
| DATE: | 29 MARCH 2011 |
| PLACE: |  |

**REASONS FOR DETERMINATION:**

**(SERVICE TARGET PERFORMANCE INCENTIVE SCHEME)**

1. On 24 December 2010, the Tribunal delivered its reasons for judgment in respect of the part of Ergon Energy Corporation Limited’s (‘Ergon Energy’) application for review of the Australian Energy Regulator’s (‘AER’) distribution determination made on 6 May 2010 (‘the Determination’) relating to its Service Target Performance Incentive Scheme (‘STPIS’): see *Application by Ergon Energy Corporation Limited (Service Target Performance Incentive Scheme) (No 5)* [2010] ACompT 13.
2. The Tribunal found that no ground of review under s 71C(1) of the *National Electricity Law* (‘NEL’) had been established by Ergon Energy. It directed the parties to confer and provide minutes of the appropriate determination to be made in light of the above reasons by no later than 4pm on Monday, 31 January 2011.
3. The Tribunal noted that the AER had referred to an error in the course of identifying incentive rates and that this error may need to be reflected in the minutes of the Tribunal’s determination.
4. On 21 January 2011, the AER provided Ergon Energy a draft minute which proposed to vary the incentive rates in the Determination.
5. On 31 January 2011, Ergon Energy wrote to the AER stating:
6. the proposed amended incentive rates could not be assessed on their face;
7. the AER had not provided a live model to enable Ergon Energy to review the calculation; and
8. its view that, as Ergon Energy had failed to establish a ground of review with respect to the STPIS, the only appropriate order for the Tribunal to make was one affirming the Determination.
9. On 24 February 2011, the AER provided Ergon Energy with a note outlining the alleged error and an extract from the AER’s internal STPIS model.
10. On 28 February 2011, Ergon Energy responded to the AER confirming that Ergon Energy’s view remained as set out in its letter of 31 January 2011.
11. On 8 March 2011 the Tribunal requested the parties provide short written submissions by 4pm on Thursday, 17 March 2011.
12. The AER first identified the alleged error in the incentive rates in its written submissions in relation to the STPIS dated 9 November 2010. At paragraph 56 of those submissions, the AER stated that it had identified an error in the Determination in that it had not properly adjusted for CPI for 2009/10 in its calculation of the applicable incentive rates and set out its proposed corrected rates.
13. Apart from stating that the alleged error had been identified, the AER’s submission in paragraph 56 did not reveal how the incentive rates in the Determination had been calculated or how the alleged “corrected” rates had been calculated.
14. On 24 February 2011, the AER provided a spreadsheet, which calculates the proposed correction to the incentive rates. The spreadsheet is derived from the AER’s internal STPIS model. The spreadsheet is not, to Ergon Energy’s knowledge, wrong.
15. Subject to exceptions in s 71R of the NEL, in reviewing the Determination the Tribunal must not consider any matter other than review related matter: see s 71R(1) of the NEL.
16. Clearly s 71R(2) does not apply. There also seems no doubt that the material now sought to be relied upon by the AER is not ‘review related matter’.
17. It follows that the Tribunal is prevented from considering the spreadsheet and the model which are relied upon as they are not ‘review related matter’ as defined in s 71R(6).
18. There seems to be no other review related matter that supports the AER’s submission that the corrected incentive rates set out in its submissions are calculated in accordance with the STPIS.
19. As the Tribunal found that there was no error in the setting of the STPIS targets and that no ground of review under s 71C(1) had been established, the Tribunal may not allow the spreadsheet or the model to be submitted under s 71R(3).
20. The AER noted that there is another method by which the mistake made in calculating the incentive rates may be able to be corrected outside the review process. Clause 6.13 of the *National Electricity Rules* (‘the Rules’) provides the AER with the power to revoke a distribution determination where it is affected by a material error or deficiency caused by, among other things, a clerical mistake, an accidental slip or a miscalculation. If the AER revokes a distribution determination using this power, it must make a new distribution determination which corrects the relevant error or deficiency.
21. The Tribunal considered whether standing in the shoes of the AER it could, as a matter of power, correct the mistake. However, the difficulty the Tribunal has is that it needs to have before it material to make this decision, which it does not have because the material needed would not be ‘review related matter’. So even if in reliance on s 71O of the NEL the AER was permitted to raise the mistake, there is no basis upon which the Tribunal could make the correction.
22. It is unfortunate that this circumstance has arisen, but the Tribunal sees no alternative but to leave it to the AER to correct any error in relation to the incentive rates.
23. This now seems to be the position accepted by the AER. The AER no longer presses for the Tribunal to make an order correcting the miscalculation in the incentive rates. The AER no longer contends that the model is a ‘review related matter’. The AER agrees with the form of determination proposed by Ergon Energy.
24. We make this final observation. As a tentative view only, it seems that if the mistake made in the calculating of the incentive rates and the likely impact of this mistake is demonstrated to be as described in the written submissions of the AER dated 17 March 2011, then cl 6.13 of the Rules would seem to be applicable, empowering the AER to revoke the Determination.
25. The appropriate form of determination to be made by the Tribunal is as follows and is provided in a separate minute of determination:
* Pursuant to section 71P(2)(a) of the *National Electricity Law*, the “Queensland Distribution Determination 2010-11 to 2014-15” made by the Australian Energy Regulator in May 2010, to the extent that it relates to the Service Target Performance Incentive Scheme applicable to Ergon Energy Corporation Limited (as referred to in paragraph 4 of the Application for Review filed by Ergon Energy Corporation Limited), is affirmed.
* There be no order as to costs.

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| I certify that the preceding twenty-two (22) numbered paragraphs are a true copy of the Reasons for Determination herein of the Honourable Justice Middleton (Deputy President), RC Davey and RF Shogren. |

Associate:

Dated: 29 March 2011